INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	4
Statement	4
Argument	7
Conclusion	17
Appendix A	18
Appendix B	23

TABLE OF CITATIONS

Cases:

American Power & Light Co. v. *Securities & Exchange Commission*, 329 U.S. 90	15
American Telephone & Telegraph Co. v. *United States*, 299 U.S. 232	15
Arizona v. *California*, 373 U.S. 546	11
East Bay Municipal Utility District, 1 FPC 12	11
Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17	15
Federal Trade Commission v. *Minneapolis-Honeywell*, 344 U.S. 206	14
First Iowa Hydro-Electric Coop. v. *Federal Power Commission*, 328 U.S. 152	9
Idaho Power Co. v. *Federal Power Commission*, 346 F. 2d 956, pending on petition for certiorari, S.Ct. No. 630, O.T. 1965, filed September 29, 1965	14

Cases—Continued	Page
Oakdale Irrigation District and South San Joaquin Irrigation District, and Tuolumne County Water District No. 2, 10 FPC 810	11
Pacific Power & Light Co. v. *Federal Power Commission*, 333 F. 2d 689, certiorari denied, 379 U.S. 969	14
Portland General Electric Co. v. *Federal Power Commission*, 328 F. 2d 165	11, 12
Public Utility District No. 1 of Pend Oreille County v. *Federal Power Commission*, 308 F. 2d 318, certiorari denied, 372 U.S. 908	14
Southern California Edison Co., 8 FPC 364	11
United States v. *City and County of San Francisco*, 310 U.S. 16	15
Utah Power & Light Co. v. *Federal Power Commission*, 339 F. 2d 436	15
Wisconsin v. *Federal Power Commission*, 373 U.S. 294	15
Statutes and regulations:	
Federal Power Act (Act of June 10, 1920), 41 Stat. 1063, *et seq.*, as amended (16 U.S.C. 791a-825r)	4, 18
Section 4(c), 16 U.S.C. 797(c)	17
Section 4(e), 16 U.S.C. 797(e)	4, 18
Section 6, 16 U.S.C. 799	4, 13
Section 10(a), 16 U.S.C. 803(a)	4, 12
Section 23(b), 16 U.S.C. 817	4, 16, 19
Section 27, 16 U.S.C. 821	3, 8, 10, 11
Section 29, 16 U.S.C. 823	3, 4, 8
Section 313(b), 16 U.S.C. 825*l*(b)	4, 20

Statutes and regulations—Continued Page

Raker Act of 1913, c. 4, 38 Stat. 242 ..... 4, 8, 9
Section 9(b) 6
Section 9(c) 6
Reclamation Project Act of 1902, Section 8, c. 1093, 32 Stat. 390, 43 U.S.C. 383 .. 10

Miscellaneous:

51 Cong. Rec. 14071 11
H. Rep. No. 842, 63rd Cong., 2d Sess. 11
H.R. 16673, 63rd Cong., 2d Sess. 11

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 580

THE PEOPLE OF THE STATE OF CALIFORNIA, PETITIONER

v.

FEDERAL POWER COMMISSION

No. 591

TURLOCK IRRIGATION DISTRICT, CALIFORNIA, AND MODESTO IRRIGATION DISTRICT, CALIFORNIA, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet., No. 580, App. A, pp. 13-31; Pet., No. 591, App. A, pp. 1a-23a)

is reported at 345 F. 2d 917. The order (R. 648-702) of the Federal Power Commission is reported at 31 FPC 510, and the order on rehearing (R. 772-781) at 31 FPC 1128.[1] The Hearing Examiner's initial decision (R. 438-533) is reported at 31 FPC 535.

JURISDICTION

The judgment of the court of appeals (Pet., No. 591, App. A, pp. 1a-23a) was entered on May 18, 1965. A timely petition for rehearing was filed by petitioners in No. 591 and denied on June 22, 1965. The petition in No. 580 was filed on September 17, 1965;[2] the petition in No. 591 was filed on September 20, 1965. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTIONS PRESENTED

Two California irrigation districts with prior water rights in the Tuolumne River (the petitioners in No. 591) propose to construct and operate, partly on lands of the United States, a dam project which will develop hydroelectric power and permit water storage for municipal, flood control, and irrigation purposes. The City of San Francisco will benefit

---

[1] See Errata Sheet for Joint Appendix (R. 702, 780-781) for corrections to R. 658, 674, 683, 774, and 776. A corrected R. 776 is appended hereto, see App. B, *infra*, pp. 23-24.

[2] As to the timeliness of the petition in No. 580, see note 16, p. 14, *infra*.

from the project and has agreed to contribute a substantial portion of the cost of construction. Downstream from the site of the proposed dam are important salmon fisheries which the Districts are now free to endanger by exercising their appropriative rights and diminishing the river flows. The Federal Power Commission has granted the districts a 50-year license to construct and operate the dam project with certain conditions designed to protect the river salmon —conditions which the Districts deem too onerous and which California alleges are insufficient. Against this background, the questions are:

1. Whether a license condition that may require the use of water that the applicants have the right to use for irrigation under State law "affects" or "interferes" with that law or any vested right acquired thereunder, in conflict with the saving clauses of Sections 27 and 29 of the Power Act, or constitutes a taking of property without compensation.

2. Whether it was unreasonable for the Commission to permit a reduction of water releases below the level required to fully protect downstream fish runs in low water years in order to preserve the economic feasibility of the project.

3. Whether the Commission acted unreasonably in deferring fixing the schedule of required water releases beyond the first twenty years of the license term until the economic feasibility of such releases can be determined and alternative modes of fish protection considered.

4. Whether the City of San Francisco should have been required to join as an applicant for the license.

STATUTES INVOLVED

The relevant statutory provisions are sections 4 (e), 23(b), and 313(b) (App. A, *infra.* pp. 18-22), and sections 6, 10(a), 27, and 29 (Pet., No. 591, App. B, pp. 25a-27a), of the Federal Power Act (Act of June 10, 1920, 41 Stat. 1063, *passim;* 49 Stat. 860; as amended, 16 U.S.C. 797(e), *passim;* and the Raker Act of 1913 (Pet. No. 591, App. B, pp. 27a-45a) (38 Stat. 242).

STATEMENT

The Tuolumne River rises in the Sierra-Nevada Mountains and flows westerly into the San Joaquin River (R. 439). The City of San Francisco maintains a series of large reservoirs and dams on the headwaters of the Tuolumne and diverts water at Early Intake for its municipal purposes, pursuant to the Raker Act (R. 649-650). Petitioners in No. 591 (hereinafter "Districts") own and operate the existing Don Pedro power and storage project many miles downstream on the Tuolumne, and the La Grange diversion dam four miles farther downstream (R. 650-651). The Districts are the sole distributors of irrigation water and electricity in their respective service areas situated in Stanislaus and Merced Counties, California (R. 440-441, 457-458).

The Districts' existing Don Pedro Dam is located in Tuolumne County. The proposed New Don Pedro Dam, if constructed, will be situated one and one-half miles downstream from the existing Don Pedro Dam and will inundate it (R. 650). In addition to La Grange Dam, the Districts own two smaller offstream

reservoirs (Turlock and Modesto Reservoirs) and a network of irrigation canals fed by gravity from the La Grange Dam pool (R. 441, 453-454). Fall-run king salmon spawn in the Tuolumne in a 20 mile reach of the river commencing about one and one half miles downstream from La Grange Dam (R. 676).

By the orders affirmed below, the Federal Power Commission approved the issuance of a 50-year license to the Districts for the New Don Pedro Project. That project (including the dam, reservoir, power house, and related project works) will be located in part on lands owned by the Districts but in greater part on lands which they do not own, including 2,868 acres of lands of the United States (R. 649). The Commission orders required operation of the project for the first 20 years so as to discharge specified schedules of water releases during the fall-run king salmon spawning season, even though water thus released can not be utilized by the Districts for irrigation purposes (R. 681-684). They reserved for later determination the requirements to be imposed for fish protection during the remainder of the license term (R. 676, 683). In so doing the Commission noted that 20 years later much more would be known about the limits of economic feasibility on the amounts of fish releases, and the possible alternative measures for fish protection that may then be available (R. 667-668). By 1985 alternate sources of water might become available or break-throughs might occur in artificial fish rearing methods which would provide for more economical protection of the salmon popula-

tion and the use of significantly smaller quantities of water (R. 667-668).

The Commission found that the Districts could service and redeem their bonded investment in the project under the prescribed mode of operation, which will preserve a minimum dependable capacity of 73,000 kilowatts (R. 667). It recognized that unprecedented low water conditions could require some curtailment in the use that could otherwise be made of water for irrigation purposes (R. 772-774).

The New Don Pedro Project will be multi-purpose, providing a larger reservoir, of which 811,000 acre feet would be used for irrigation storage by Districts, 340,000 acre feet for flood control storage by the United States, and 570,000 acre feet for exchange storage by San Francisco (R. 445, 447, 456, 674). The New Don Pedro Project would also include a powerhouse with 130,440 kilowatts of capacity (R. 674-675). In addition, in the non-flood-control season the Districts and San Francisco will share in the use of the storage not then needed for flood control (R. 674).

Under California law the Districts and San Francisco own virtually all the rights to divert water from the Tuolumne River. The Districts' water rights are older than those of San Francisco and have priority under California law (R. 52-62, 341-342). Section 9(b) and (c) of the Raker Act (Pet. No. 591, App. B, pp. 35a-36a) recognized the prior right of the Districts to 2,350 cubic feet per second the year round and a total of 4,000 cubic feet per second for sixty days each spring commencing April 15. In

order fully to utilize its investment in overland water transmission facilities, it will be advantageous to San Francisco to make its diversions at Early Intake, substituting storage of late fall, winter, and spring flows in the New Don Pedro reservoir to meet the Districts' water right priorities during low water seasons (R. 31-34, 445-446, 461-462).

The New Don Pedro Project will cost about $92,000,000 (R. 446). Slightly more than half that amount will be obtained by the Districts from sales of bonds to be serviced and redeemed from resulting power revenues (R. 659, 667). The balance will be borne by San Francisco's payments for the exchange storage upon a cost basis (R. 659-660, 670-671).

ARGUMENT

The Commission here granted the application of the Districts, petitioners in No. 591, for a license to use lands of the United States for a reservoir, dam, powerhouse, and other related works on the Tuolumne River.[3] The proposed project would develop hydroelectric power, provide storage for municipal, irrigation and flood control purposes, provide recreational facilities, and some water for protection of fish life. The license offered to the Districts contained a requirement (R. 681-683) that the project be so oper-

[3] The applicability of the licensing provisions of Part I of the Federal Power Act being clear from the fact that the use of lands of the United States is necessary for the construction, operation, and maintenance of the project works (see *infra*, p. 5), no evidence was introduced as to any other basis for the licensing.

ated as to provide specified minimum downstream flows during the fall run of king salmon to maintain spawning beds and thereby preserve the river as a fishery resource. In No. 591, the Districts complain that the requirement is too burdensome; in No. 580, California argues that it is not sufficient.

1. The Districts object to the so-called "fish release" provision because, unless modified in the event of an unprecedented shortage of water (which the Commission found no basis to anticipate),[4] the requirement might result in the use of some of the water to which the Districts are entitled by prior appropriation under State law. Their argument is that, since no one else could be licensed to interfere with their prior right of use of that water for irrigation without compensation, they cannot be required to suffer the interference simply because they are the licensees.

This is an obvious *non sequitur*. It may freely be conceded that the water rights the Districts contend will be impaired are rights under California law relating to the "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses," within the meaning of Section 27 of the Power Act.[5] That is, they are rights under State

---

[4] The Commission said (R. 774): "We do not expect this situation [*i.e.*, conflict between the irrigation needs for the water and needs for fish releases] to arise, but if it should we would consider such modification of the license to the extent shown to be necessary in the public interest."

[5] For the wording of Section 27, see Pet. No. 591, App. B, p. 26a. The Districts' arguments based on the Desert Land Act, (Pet. 17-18), and the Raker Act of 1913 and Section 29

law "not superseded by the terms of the Federal Power Act," in the words of *First Iowa.*[6] But it does not follow that the water covered by such rights cannot be devoted to the purposes of a licensed project if the license applicant who owns or will acquire such rights so proposes, or if the applicant agrees to a Commission condition that requires it.

Indeed, the Districts assume that it would suffice if a project owner who (unlike the Districts) does not himself own the water rights affected by the prescribed operation of the project were to acquire the right of interference from the owners (Pet. p. 24). Many projects could not be constructed or operated without such acquisitions.[7] Yet, when an applicant

---

of the Federal Power Act (Pet. 21-23), are merely cumulative and are subject to the same error. Moreover, the assumption made by the Districts that the condition prescribed by the Commission will require use of water that San Francisco is entitled to use under the Raker Act, is wholly erroneous. The Commission made allowance for all of San Francisco's uses. R. 657, 658, n.8, 662, 666, 668-669.

[6] *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152, 175-176, as quoted in the Districts' petition, No. 591, pp. 12-13. The Court there also spoke of the "need for an express 'saving' clause in the Federal Power Act if the usual rules of supersedure are to be overcome," in obvious reference to the fact that the licensing provisions of Part I are in large part designed to apply to projects of the kind involved in that case that are subject to the jurisdiction of Congress under the Commerce clause, as well as those of the kind involved here that are subject to its jurisdiction only under its power over lands of the United States.

[7] See, for example, *First Iowa, supra*, 328 U.S. at 158, where the applicant for license proposed to acquire by purchase all,

for license already owns some or all of the necessary water rights which he contributes to the operation of the project there is no greater impairment of those rights than there would be if they had to be acquired for that purpose after the license is issued.[8] As the Court has said repeatedly of the similar language of § 8 of the Reclamation Act,[9] the model for Section 27

---

and had obtained option on 98%, of the downstream riparian rights that would be needed because the operation of the project as proposed would divert a large part of the flow of the river from its natural channel.

[8] The Districts argue (Pet. 20) that the Commission's power to impose such a condition discriminates "against license applicants which are public agencies having vested irrigation and municipal water rights [because they] * * * would be required to surrender those rights without compensation as a condition to receiving a license, while license applicants possessing no such rights could not be similarly burdened." The argument overlooks the obvious fact that if any one other than a public agency were licensed for such a project it would have to bear as great a burden because it would have to acquire the water rights. Either would be allowed his original cost of acquiring such rights for Power Act purposes.

[9] Section 8 reads as follows: "Nothing in * * * [this Act] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing * * * [herein] shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." 43 U.S.C. 383.

of the Power Act [10] (*Arizona* v. *California*, 373 U.S. 546, 586):

> As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. * * *

Section 27 simply makes clear that the license is not the source of such rights.[11] As the court below had

---

[10] *Portland General Electric Co.* v. *Federal Power Commission*, 328 F. 2d 165, 176 (C.A. 9). In the debate on the Ferris bill (H.R. 16673, 63rd Cong., 2d Sess.)—a predecessor to the bill that became the Federal Water Power Act—Congressman Raker said of section 14 of that bill which was substantially identical to the present Section 27 of the Power Act (H. Rep. No. 842, 63rd Cong., 2d Sess., p. 4): "* * * But let me call the attention of the gentleman to the fact that this provision is in the reclamation act, and when the Government attempts to obtain a water right under the reclamation law for its reservoirs, for its dams, and for its irrigation projects it goes into the State and files its application for a water right, and commences the construction of the dam and ditches, just the same as a private individual, and its right is determined and disposed of under the same law as though the gentleman himself had gone into the State of California, or Oregon, or Nevada, and applied for a water right. * * *" 51 Cong. Rec. 14071.

[11] The Commission has repeatedly treated controversies with respect to ownership of needed water rights as matters to be determined locally under state law and has refused to allow such questions to interfere with its licensing decisions, leaving the licensee to procure any such rights that it does not hold. *East Bay Municipal Utility District*, 1 FPC 12, 13; *Oakdale Irrigation District and South San Joaquin Irrigation District, and Tuolumne County Water District No. 2*, 10 FPC 810, 811. The decision in *Southern California Edison Co.*, 8 FPC 364, 385-386, had the same effect, notwithstanding some of the language in the opinion.

previously held in *Portland General Electric Co.* v. *Federal Power Commission*, 328 F. 2d 165, 176, to which it referred in the present case (Pet. No. 591, App. A, pp. 9a-10a):

> * * * The only purpose of section 27 is to preserve to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed as an incident to the exercise *by another*, of a license granted by the Commission [emphasis supplied; footnote omitted].

The license condition that requires the devotion of such rights to the purposes of the project does not "impair," "interfere with," or "take" such water rights, any more than the usual license provisions "impair" any of the rights in land, rights-of-way, flowage rights, or easements that they require the licensee to devote to the project, or "impair" the money they require the licensee to invest. The applicant need not accept the license and proceed with the proposed project if it does not wish to devote the necessary rights or capital to the enterprise.[12]

This is not to say that the present condition may be expected to result in the applicants' rejection of the license and abandonment of the proposed project. The Commission carefully tested the economic feasibility of the project with this obligation attached and its findings in that regard are not controverted by the Districts. Significantly, it was the Commission's

---

[12] There is, therefore no question of a taking in violation of the Fifth Amendment, as the Districts argue (Pet. 23-24), so long as the condition is reasonable and in accord with Section 10(a).

inability to determine the limits of economic feasibility as it might be affected by fish releases after the first twenty years that caused it to prescribe the amounts of minimum required flows only for the first twenty years, leaving the requirements thereafter for later determination when the limits of economic feasibility and the possible alternative measures that may then be available can better be appraised.[13] This does not mean, as the Districts argue, that they are required "to give the Commission a blank check" (Pet. 19-20). The Commission specified the standards governing such future determinations, including the standard of economic feasibility of project operation under the terms to be prescribed.[14] As the court below concluded (Pet. No. 591, App. A, pp. 11a-13a) from a full consideration of the Districts' contention, the condition, "provide[s] as much precision and definiteness in this regard as is presently practicable." Section 6, which requires that the terms and conditions of the license shall be expressed in the

---

[13] R. 666-669, 775-776. (Attention may be called to the fact that an errata sheet to the printed record makes corrections to page 776 of the record. For a reprint of R. 776 embodying the corrections, see App. B, *infra*, pp. 23-24.)

[14] The public interest in preservation of the fish resources of the river is served because, as the Commission said (R. 657): "* * * even without such a condition the salmon runs would be preserved longer with New Don Pedro than with existing Don Pedro. On the basis of the record we would expect that New Don Pedro could be operated without adverse effect on the salmon runs until after 1985 * * * whereas without New Don Pedro it appears that the fish would be seriously affected, if not destroyed, after 1968 * * *."

license, does not require impracticable specificity of detail.[15]

2. California, petitioner in No. 580,[16] reiterating contentions rejected by both the Commission and the court of appeals, argues that maintenance of even larger downstream flows than those specified should be required in low water years, that minimum flows should be specified now for the full 50-year term of the license (instead of providing that the amounts for the last thirty years would be determined later), and that the City of San Francisco should have been made a party to the license.[17] The Secretary of the Interior

---

[15] Similar reservations are often made in issuing Part I licenses and, where they have been before the courts on review, have given rise to no difficulty. See *Idaho Power Co.* v. *Federal Power Commission*, 346 F. 2d 956, 958-959 (C.A. 9), pending on petition for certiorari, S.Ct. No. 630, O.T. 1965, filed Sept. 29, 1965; *Public Utility District No. 1 of Pend Oreille County* v. *Federal Power Commission*, 308 F. 2d 318, 323 (C.A.D.C.), certiorari denied, 372 U.S. 908; *Pacific Power & Light Co.* v. *Federal Power Commission*, 333 F. 2d 689, 692-693 (C.A. 9), certiorari denied, 379 U.S. 969.

[16] While we do not urge it as a bar to consideration of California's petition, we note a timeliness question in No. 580. That petition, filed September 17, 1965, is out of time unless the 90-day period is computed from the date the court below denied a petition for rehearing filed by the petitioners in No. 591—California itself not having applied for rehearing. Because the only petition for rehearing was submitted by adversary parties and raised somewhat different issues, California's present contentions may not have been preserved. Cf. *Federal Trade Commission* v. *Minneapolis-Honeywell*, 344 U.S. 206.

[17] California plainly means the City should have been made a joint licensee—not merely a party to the proceeding. The

advanced like contentions below (R. 536-607, 703-731). The Solicitor General takes no position with respect to the correctness of the rulings on these points, believing that the questions presented by California's petition are not of such character as to require re-examination in this Court. No conflict of any kind is suggested; the matters sought to be raised are largely within the discretion of the Federal Power Commission to decide; and the reviewing court has concluded, after full consideration, that the agency did not act arbitrarily. See *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21-23; cf. *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U.S. 90, 112-113; *United States* v. *City and County of San Francisco*, 310 U.S. 16, 29-30; *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236-237.

On the merits, the Federal Power Commission defends the correctness of the rulings below, disputing California's contentions upon the following grounds:

(*a*) For the first twenty years, the amounts of water required to be released to protect the salmon

---

point is preserved in its application for rehearing before the Commission (R. 768) where it said: "* * * The most effective procedure for ascertaining the benefits to be derived by the City and County of San Francisco would be to require them to became an applicant for license in that project. This procedure was requested by the Secretary of the Interior in its motion filed on July 20, 1963. We submit that this motion should have been granted * * *".

No different objection can be considered now. *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 307; *Utah Power & Light Co.* v. *Federal Power Commission*, 339 F. 2d 436, 438 (C.A. 10).

in the river are precisely those suggested by California itself, the only dispute being over the method of determining the "dry years" when lesser releases are provided for. The Commission defined "dry years" in terms of the actual available water at the crucial point, whereas California would ignore upstream diversions and base the computation on a hypothetical river flow. Yet, the sole reason for decreasing the required releases in "dry years" is to lessen the burden on the licensees during periods of low water so as not to imperil the economic feasibility of the project (R. 660-664)—not because the need for water to preserve the salmon is then reduced. Accordingly, the Commission deemed it appropriate to look to the actual supply of water, not what would be theoretically available if no upstream diversions occurred.

(*b*) The Commission deferred consideration of the conditions to be imposed upon the licensees for the last 30 years of the license because it thought that the more acute problems of accommodation anticipated for that time might well be subject to a new solution in light of changed circumstances. As already noted, the Commission reasoned that the wiser course was to await a time when more would be known about the limits of economic feasibility as affecting the amounts of fish releases and about possible alternative measures for fish protection (R. 658-659).

(*c*) Finally, the Commission answers the suggestion that the City of San Francisco should have been made a party by reference to Section 23(b) of the

Power Act which requires only those who "construct, operate, or maintain" a project to obtain a license. See, also, Section 4(c) of the Act.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

JOHN C. MASON,
Deputy General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

JOSEPH B. HOBBS,
DANIEL GOLDSTEIN,
Attorneys,
Federal Power Commission.

November, 1965

APPENDIX A

STATUTES INVOLVED

The Federal Power Act, June 10, 1920, 41 Stat. 1063, *et seq.*, as amended (16 U.S.C. 791a-825r), provides in part:

> 4(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization

of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further*, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the fact and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * *

23(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters

of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * * *

313(b) Any party to a proceeding under this Act aggrieved by an order issued by the Com-

mission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evi-

dence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

APPENDIX B

Reprint of page 776 of the Record to show incorporation of errata sheet corrections (see note 1, *supra*, p. 2).

relevant evidence to aid our determination. It is not unreasonable that this should be so, since this is not a case where the licensing of the project will create a fish problem. As Opinion No. 420 makes clear, this project will greatly relieve an existing situation in which the fish would soon be destroyed if the project were not built. Even without the prescribed fish releases, the construction of the new project would be beneficial to the salmon runs; and with the required releases, there will be a maximum use of the river for the benefit of all interests. Under these circumstances, and as provided in Opinion No. 420, the fish interests will have the primary obligation for showing the need for continuing releases from New Don Pedro at the end of the 20-year period if such releases are to be ordered. The applicants, however, will have to show, *inter alia*, the water required to maintain the economic feasibility of their project; the water available at New Don Pedro for irrigation, power, and conservation purposes; the availability of any alternative sources of water for such purposes or other alternative solutions to the fish problem as it may then exist; and their then existing and expected future needs for water for irrigation purposes. San Francisco will also be required to make a showing of its then existing and expected future needs for water for municipal purposes, and to demonstrate

the interrelation of New Don Pedro with the operation of its Hetch Hetchy municipal water supply and power system.

California and the Secretary also question the burden put on them of finding and financing future solutions to the fish problem. With respect to the interim studies of alternative methods of preserving the fish, it is in the interest of all of the parties to cooperate in finding a mutually agreeable solution. Our order cannot bind California or the Secretary of the Interior to undertake such studies or to contribute to their cost. We do, however, expect that these parties will cooperate with the applicants in the interest of conservation. Article 39 directs the applicants to make such studies with the cooperation of Cali-

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 792859 322